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No.

IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH, et al.,
Cross-Appellants

v.

UNITED STATES OF AMERICA, et al.,
Cross-Appellees

On Appeal From the United States District Court for the Central District of California

CROSS-JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does imposition of the Federal Unemployment Tax Act on pervasively religious schools violate rights, guaranteed by the Religion Clauses of the First Amendment, of those schools, of churches of whose mission religious schools are a part, of teachers pursuing a religious vocation in such schools and of parents whose children are enrolled therein?

The parties in the court below were:

PLAINTIFFS

Grace Brethren Church of Long Beach, California, and its pastor, Rev. David L. Hocking;

Calvary Cross Church of the Highlands of San Bruno, California, and its pastor, Rev. Donald B. Sheeley;

Scott Memorial Baptist Church of San Diego, California, and its pastor, Rev. Tim LaHaye;

Christian Unified Schools of San Diego, an incorporated association of five fundamentalist schools with a central office in El Cajon, California;

Redwood Christian Schools, an incorporated association of four fundamentalist schools with a central office in Castro Valley, California;

Sidney and Patricia Bowen of Compton, California, whose children attend Grace Christian Schools, an affiliate of plaintiff Grace Brethren Church;

Peter and Sue Farrelly of Pacifica, California, whose children attend Highlands Academy, an affiliate of plaintiff Calvary Cross Church of the Highlands;

William and Janet Tschantz of La Mesa, California, whose children attend plaintiff Christian Unified Schools of San Diego;

Arthur and Cheryl Brandwood of Hayward, California, whose children attend plaintiff Redwood Christian Schools;

Stanley Eddington of San Lorenzo, California, a teacher at plaintiff Redwood Christian Schools;

R. Florence Murti of Daly City, California, a teacher at Highlands Academy; and

R. Suzanne Royer of Long Beach, California, a teacher at Grace Christian Schools.

DEFENDANTS

The State of California;

The California Employment Development Department;

The Director of the California Employment Development Department;

The United States of America;

The United States Department of Labor; and

The United States Secretary of Labor.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CROSS-JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court filed September 21, 1979 (App. A)[1] is unreported. The first supplemental opinion, filed June 2, 1980 (App. C), and the second supplemental opinion (App. E), filed April 3, 1981 (App. F) are likewise unreported.

1. The Appendices to the Jurisdictional Statement filed by the appellants United States of America, *et al.* are hereby incorporated by reference, and all citations to the appendices will refer to the pagination therein.

JURISDICTION

The judgment of the district court was entered on April 6, 1981 (App. F). Cross-appellees (the federal parties) filed notice of appeal to this Court on April 29, 1981 (App. G). On June 19, 1981, Justice Rehnquist extended the time in which to docket the appeal to and including August 3, 1981 (App. H). The cross-appellants take this cross-appeal under the second paragraph of 28 U. S. C. § 1252, having received notice of appeal by cross-appellees that the latter had invoked the jurisdiction of this Court herein under that section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendent 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

26 U. S. C. 3309(b):

> This section shall not apply to service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

Cal. Unemp. Ins. Code § 634.5 (West Supp. 1980):

> With respect to * * * any nonprofit organization described by Section 608, "employment" does not include * * * service performed in any of the following:
>
> (a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

STATEMENT OF THE CASE

On January 8, 1979, Grace Brethren Church, along with other churches and their pastors, two groups of religious schools, parents of children attending these, and teachers in the schools, brought this action in the district court against the United States and the State of California. The complaint challenged the imposition, upon the schools of the plaintiff churches and the other plaintiff religious schools, of the Federal Unemployment Tax Act ("FUTA"), 26 U. S. C. § 3301 *et seq.*, and the corresponding California Unemployment Insurance Code. Count II of the complaint recited that the imposing of these tax acts upon the religious ministries in question violated the Free Exercise Clause. The district court, on April 6, 1981, enjoining the imposition of the acts on statutory and other constitutional grounds,[2] held that no violation of the Free Exercise Clause arises from such imposition (App. F). The United States filed notice of appeal to this Court on April 29, 1981 (App. G), and on June 19, 1981, Justice Rehnquist extended, until August 3, 1981, the time in which to docket the appeal. The appeal by the United States is pursuant to 28 U. S. C. § 1252. The churches, religious schools, parents and teachers now cross-appeal pursuant to the second paragraph of the same jurisdictional statute.

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2. The district court held that the imposition of the unemployment tax program on the church-schools (whether incorporated separately from a church or not) (a) is barred by the plain meaning of § 3309(b)(1) of the federal act which exempts church employees, and (b) creates excessive church-state entanglements forbidden by the Establishment Clause. The court also held that application of the act to the non-church religious schools would be "incompatible with the Religion Clauses of the First Amendment . . . because they result in excessive entanglement of the state with religion . . ." (App. F at 88a).

THE QUESTION PRESENTED IS SUBSTANTIAL

This cross-appeal presents issues to the Court of major significance to churches and religious ministries throughout the nation. The judgment of the district court, holding that religious liberty is not violated by the taxing of a religious ministry, contradicts principles long established by the Supreme Court.

The cross-appellees' complaint set forth seven ways in which Free Exercise rights would here be violated through imposition of the Unemployment Tax Act.[3] The district court specifically dealt with but one of these—namely, the taxing of a ministry. The threefold basis for the district court's conclusion that no Free Exercise violation results from such taxation is: (a) the tax is "indi-

3. (a) It imposes a tax and other financial burdens upon purely religious activity; (b) it imposes burdens of accounting and reporting upon religious ministries; (c) it reaches into churches and places under an unsolicited government program of employee benefits, church employees who are engaged in carrying out a religious ministry; (d) it burdens and endangers the ability of parents to choose a religious education for their children; (e) it burdens and endangers the opportunity of religious teachers to carry out their religious vocation in the Christian formation and education of young people; (f) it burdens and endangers pastors of churches and religious administrators of religious schools in the exercise of their religious ministry in education; (g) under familiar principles of unemployment compensation law, and under the laws of California, an award of unemployment compensation may depend upon a determination having been made by a governmental entity of whether there was termination of employment for "just cause". Termination of employment from a church entity, however, may in given instances be on religious (including moral) grounds. Yet a governmental agency rendering the "just cause" determination may not base its determination upon religious principles but solely upon secular standards. Thus the churches may be required to pay unemployment compensation where dismissal was based upon religious grounds

rect"—*i.e.*, it is not directly on a religious activity, (b) the tax is an "insufficient burden" on religious freedom to justify holding it unconstitutional, (c) a compelling state interest justifies imposing the tax. To the contrary, it is clear that:

1. The tax affects religious activity. If the tax in question does not directly weigh upon religious activity, then no constitutional issue is posed by it. The court below stated two reasons that the tax should not be held to directly affect religious activity: It "is collected from religious institutions, not from individual religious believers". (App. E at 62a); second, the tax "is imposed upon the employment relationship and not upon individual religious acts". *Ibid.* Neither point is correct, though each is of high constitutional significance in the premises. Obviously, the fact that a tax is collected from religious institutions, and not from individual religious believers, does not relieve the tax of any possible unconstitutional feature; indeed, a tax on some religious institutions may be tantamount to a tax on individual religious believers, or on religious activity itself. The court was plainly incorrect in the conclusion at which it arrived in the following key statement:

> "It is true that individual teachers and administrators may view their work as a religious calling and that the primary purpose of religious schools is to inculcate religious doctrine. It is also true that administrators of religious schools may hire or terminate employees on religious grounds. However, none of the foregoing facts transforms the hiring or firing of a teacher, or the payment of his salary, from a secular to a religious act analogous to preaching. To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of re-

ligion or to those who engage in it is constitutionally immunized from taxation." (App. E at 12a).

The trial record, however, discloses that the employment relationship, in the schools here involved, is *completely* religious, and that no valid separation can be made between (a) the pervasively religious entity which is the school, (b) the teacher pursuing a religious vocation within that entity, and (c) those bonds of discipline, communication, interaction and common discipleship between the two which constitute the employment relationship (T. 31-33).[4] Teachers in the Christian schools are hired for religious reasons; in most cases firing would also be for such reasons, whether related directly to doctrine, to morality, to level of fervor or to classroom proficiency—even the last-mentioned being considered part of the duty of faithful witness (T. 34-35). The views of the district court on this point are a throwback to assumptions advanced by Pennsylvania and Rhode Island in the *Lemon-DiCenso* litigations[5]—namely, that the religious schools there considered could be viewed as being composed of various "religious" and (discrete) "secular" components. This view the Supreme Court rejected seeing, instead, that such schools are unitary organisms, pervasively religious and incapable of a religious-secular bifurcation. *Lemon v. Kurtzman, supra,* at 657; *Meek v. Pittenger,* 421 U. S. 349, 366 (1975).

The district court, thus viewing the employment relationship in the Christian school as only "remotely connected to the exercise of religion", states that the Su-

4. References are to the transcript of proceedings before the Hon. Mariana R. Pfaelzer on August 12-13, 1980.

5. See *Lemon v. Kurtzman,* 403 U. S. 602 (1971).

preme Court, in its *Murdock*[6] and *Follett*[7] decisions did not intend that such activity would be "constitutionally immunized from taxation" (App. E at 62a). Those decisions the court misapplies. They stand as bedrock decisions against the taxation of religious activity. Thus they support the position of the religious parties before the Court whose activity, in the form of the employment relationship, is the religious keystone of their enterprises. There can be no doubt that, whether unconstitutionally or not, the unemployment compensation tax burdens an activity which is undeniably religious.

2. *The tax unconstitutionally burdens religious free exercise.* The district court states: "In short, the injury to Free Exercise rights asserted by plaintiffs ultimately comes down to the financial burden imposed by the extension of the unemployment compensation tax to these schools" (App. E at 60a-61a). The court held the imposing of the tax to be constitutionally inoffensive because, so the court believed, the tax burden was not "significantly" heavy. Here the court mistakenly relied, for its legal conclusion, upon dictum of the Supreme Court in *Braunfeld v. Brown*, 366 U. S. 599 (1961) and, for its factual conclusion, upon "the record as a whole". In both of its conclusions the court erred.

The dictum from *Braunfeld* in no sense sustains a principle that government may tax religious activities or enterprises if the only effect of the tax is to render these (in the words of the district court) "somewhat more expensive". Obviously, to render any activity "more expensive" may retard that activity. *Braunfeld* involved a state's Sunday closing law challenged by Orthodox Jewish mer-

6. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

7. *Follett v. McCormick*, 321 U. S. 573 (1944).

chants under the Free Exercise Clause. The law barred them from selling on Sunday, while their religion barred them from selling on Saturday. The combined effect was potentially to reduce their personal incomes. No tax was involved, and no imposition directly upon a religious activity, practice or relationship. The closing law did not bar, refer to, or in any way deal with the Orthodox Jewish Sabbath or services. Nor did it deal with religious observance on Sundays. It simply regulated secular activity on the latter days. Hence the Court was able to characterize the law's effect on the Orthodox Jewish merchants as "indirect". *Id.* at 607.[8] This is radically different from the situation at bar where not only is a tax involved but that tax is imposed directly on a critically important aspect of the religious enterprise.

The district court's employment of the *Braunfeld* dictum in the premises calls for this Court's correction because the principle is erroneous and dangerous, that the dollar-amount *smallness* of a tax on religion absolves that tax from unconstitutionality. Certainly in Establishment Clause cases the Supreme Court has most carefully stressed that the dollar-amount smallness of an exaction of public funds for religious purposes does not relieve the exaction of unconstitutionality. *Committee For Public Education v. Nyquist,* 413 U. S. 756, 787 (1973). And see Justice Black's famous discussion in *Everson v. Board of Education,* 330 U. S. 1, 16 (1947), that the Establishment Clause means, at least, that "No tax, *in any amount, large or small,*" for religious purposes may be valid. (Emphasis supplied). Madison's remark, in his *Memorial*

8. But see concurring opinion of Justice Stewart in *Sherbert v. Verner,* 374 U. S. 368, 418 (1963) in which he concluded that *Braunfeld* cannot stand consistently with *Sherbert* and argued that "the *Braunfeld* case was wrongly decided and should be overruled."

and Remonstrance about "three pence" [9] has been cited with approbation by this Court. See *Flast v. Cohen*, 392 U. S. 83, 103 (1968). The same reasoning would appear essential in free exercise situations where government claims it may tax religion provided that the tax is merely small ("incidental"). If religion can be taxed a little, why not greatly? And if religion can be taxed a little with one tax, why not a little again with another tax—and still again other "small" taxes? [10]

The trial record herein does indeed show uncontradicted testimony of religious plaintiffs below that the unemployment tax would have heavy impact upon them (T. 44-46). The schools in question refuse, upon Scriptural grounds, to accept *any* local, state or federal programs of aid. They exist solely upon the voluntary contributions of their faith communities (T. 44-45). Although teachers are paid minimum wages, much of the instruction is also supplemented by aides who volunteer their time (T. 44). It is obvious that, in a day of grow-

9. ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 WRITINGS OF JAMES MADISON, 183, 186 (Hunt ed. 1901).

10. The district court attempts to minimize the impact of the unemployment tax by stating that a nonprofit employer is free to elect the reimbursement method of contribution (App. E at 63a). That, and the fact that the tax is thus different from the taxes seen in *Murdock* and *Follett*, the court offers as additional reasons for holding the unemployment tax inoffensive. But regardless of the "reimbursement" option, both the tax and the entire program would be imposed. And the fact that this tax differs from the taxes examined in *Murdock* and *Follett* is irrelevant. The Supreme Court has never indulged the apparent presumption of the district court—namely, to hold that the taxes invalidated in those cases exhausted the list of all possible unconstitutional taxes.

ing personal taxation and inflation, *no* tax burden upon the enterprise may be dismissed as "incidental" or "small."

Further, the tax is exacted as a necessary condition to the pursuit of the religious employment relationship, because failure to pay the tax, and failure to undertake and pay for the administration of the tax program within the religious institution, results in the imposition of damaging, and ultimately crippling, penalties upon the institution. See, for example, California Unemployment Insurance Code Sections 1126 (10% penalty), 1129 (interest), 1135 (delinquent assessments), 1137 (jeopardy assessment), 1755 (levy), 1785 (warrant for enforcement of liens), and 1787 (expenses of levying and execution of warrant). The Court should also note that in addition to penalties against the institution, the persons in control of the institutions' funds who refuse to pay the amounts "due" are personally liable for such amounts (Section 1757), and are subject to criminal penalties for nonpayment (Section 2108—nonpayment, a misdemeanor). Of course, even failing to submit "required" reports can result in a criminal conviction (Sections 2106, 2109 and 2112).

Further, the challenged program would extract from a religious body its religiously entrusted funds, which are devoted entirely to religious purposes, and require their transfer to governmentally determined secular uses. See *Walz v. Tax Commission,* 397 U. S. 664, 675 (1970), and note Mr. Justice Brennan's concurrence at 692.

3. *Imposition of the tax is not justified by a compelling state interest.* The district court, on the question of compelling state interest, holds that the tax scheme "meets the *Braunfeld* criteria for validity under the Free Exercise Clause" (App. E at 64a). While, as noted *supra,*

it is quite possible that *Braunfeld* may now be read as inconsistent with the test set forth in *Sherbert*, it is in any event clear that no state interest is here present which would justify the subordination of the free exercise claims advanced. The district court, devoting but a half page (App. E at 65a) to discussion of compelling state interest, points to nothing in the record to substantiate its broad claim that the imposition of the tax program on the religious ministries in question is necessitated if the adverse effects of unemployment nationally are to be diminished through the operation of FUTA.

In *Sherbert* the State countered the religious claimant's demand for unemployment compensation benefits with an assertion, comparable to that of the district court here, that the integrity of the unemployment compensation program would be harmed were the religious claim to be recognized, and that, therefore, a compelling state interest justified denial of the claim. *Sherbert, supra,* at 407. Neither there, nor here, does "the record appear to sustain [the government's contention]." *Ibid.* The Court in *Sherbert* compared that case with the facts of *Braunfeld*, noting that, in the latter, the requiring of exemptions for Sabbatarians would have presented "an administrative program of such magnitude, and afforded the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable". *Id.* at 408-409. No comparable factors appear in the present case.

The Court in *Sherbert*, also held it incumbent upon the State "to demonstrate that no alternative forms of regulation would combat such abuses [the alleged threats to the integrity of the unemployment compensation program] without infringing First Amendment rights". *Id.* at 407. In the present case neither the Government nor the district court has offered such demonstration. Plainly

none could be offered. Just as in *Murdock, supra,* it is clear that the governmental interests which the tax is designed to support will be realized without imposing the tax on the religious activity in question.[11]

The district court's opinion omits any discussion of other specific claims which the religious parties have made under the Religion Clauses in their complaint. Each of these claims was supported by substantial evidence. For example:

Governmental conditioning of employment relationships, within religious institutions. The testimony of Government witnesses showed that it is a national practice under the Act to plunge boldly into religious issues (T. 175-184, 197-221, 261-274). This necessarily chills the exercise of religious liberty within the religious body, it being known that the propriety of every discharge is subject to review by government (though if the governmental body would decline to consider religious reasons for the discharge, an equally oppressive burden would be placed upon the institution's liberty to govern its ministry).

Imposition upon the right to pursue a religious vocation. The Supreme Court has noted that "the church-teacher relationship in a church-operated school differs from the relationship in a public or other non-religious school". *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490, 504 (1979). The teachers in the present case are unquestionably pursuing a ministry, apostolate, or religious vocation. *McDaniel v. Paty,* 435 U. S. 618, 626

11. ". . . the notion at the core of *Murdock* was plainly that the state's legitimate needs for regulation and revenue could be met reasonably well without imposing potentially crushing burdens on religious activity." L. H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 849.

(1978). Testimony was presented that their settled belief in the providence of God causes them to reject a substituted governmental providence (T. 109-111).

Injury to religious rights of parents. The trial record shows that the free exercise rights of parents are threatened by the imposition of the program. Parent plaintiffs testified that they are a prime source of the schools' funding and that the unemployment tax imposes on their schools an additional cost for a program unrelated to Christian education. They also believe that the program would lead to the presence of religiously undesirable teachers in the school (T. 115).

Excessive entanglements. This Court has frequently spoken a condemnation of "excessive entanglements" between church and state.

In *Walz v. Tax Commission,* 397 U. S. 664 (1970), the Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The Court warned against policies which can lead to "confrontations and conflicts" between government and churches. *Id.* at 674.

In *Lemon, supra,* the Court described as a "classic warning" Mr. Justice Harlan's separate opinion in *Walz* wherein he spoke of "programs,, whose very nature is apt to entangle the state in details of administration." *Id.* at 615. The Court also warned against "sustained and detailed administrative relationships (between government and these schools) for enforcement of statutory or administrative standards." *Id.* at 621.

The Court also noted that, with respect to the grants to colleges upheld in *Tilton v. Richardson,* 403 U. S. 672 (1971), there were no entanglements:

> "There are no continuing financial relationships or dependencies, no annual audits, and *no govern-*

> *ment analysis* of an institution's expenditures *on secular as distinguished from religious activities.*" *Id.* at 688. (Emphasis supplied.)[12]

The Court, in *Walz*, indicated that the processes of taxation of church activity (*i.e.*, tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes", *Walz, supra*, at 674) constitute, without more, entanglements between government and religion.

At the outset of the administrative relationship, embodied in unemployment tax coverage, the State must audit the financial records of the church or school.

The church or school is then required, on a regular basis, to make reports to the State concerning liability for contributions, and is also required to keep its books open for inspection by State auditors. The church will also have to post government notices on its premises regarding unemployment compensation, thus being made the instrument of the State in disseminating information to persons who are performing religious functions. This information may also be such as to encourage fractionalization of the school faith community.

Many other administrative commands must be obeyed, and limitless inspections and evaluations of religious matters permitted, most under criminal penalty for non-compliance.[13]

This type of entanglement, when coupled with the inhibitive element of coerced State extraction of funds intended for religious use, is "excessive entanglement"

12. Similar inspection was enjoined in *Surinach v. Pesquera des Busquets*, 604 F. 2d 73 (1st Cir. 1979), on the basis of its entangling nature.

13. See, for example, California Unemployment Insurance Code §§ 1085, 1086, 1088, 1089, 1092, 1126, 1128, 1703, 1735, 1815, 1953, 2105, 2108, 2109.

and impermissible by virtue of the Establishment Clause of the First Amendment.

Inhibition of religion. A statutory scheme offends the Establishment Clause of the First Amendment if, *inter alia*, it has a "principal or primary effect" which "advances" *or* "inhibits" religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 773 (1973). In *Nyquist*, the Court invalidated a New York program that provided State Funds for "maintenance and repair" of nonpublic schools, including religious schools. In the Court's view, the program had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." *Id.* at 774.

If, as in *Nyquist*, direct subsidy to religious schools "advances" religion, it necessarily follows that direct extraction of funds—funds earmarked for religious purposes—in the form of unemployment taxation, has a primary effect which "inhibits" religion and, under *Nyquist* and cases cited therein, cannot withstand constitutional challenge brought under the Establishment Clause.

CONCLUSION

For all of the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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